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In the Supreme Court of the United States

OCTOBER TERM, 1970.

No. 339

ROBERT BENNETT, *et al.*,
Petitioner,

vs.

CITY OF CLEVELAND, *et al.*,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit.

FRANKLIN A. POLK,
5725 Broadway;
Cleveland, Ohio 44127,
Counsel for Petitioner.

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above entitled case on April 2, 1970.

OPINIONS BELOW.

The opinion of the United States District Court for the Northern District of Ohio, Eastern Division, was rendered on June 24, 1969 and is set forth in Appendix A.

JURISDICTION.

The judgment of the Court of Appeals, rendered February 20, 1970, affirming the judgment of the District Court, is set forth in Appendix B. Petition for Rehearing was timely filed and was denied by the Court of Appeals on April 2, 1970, Appendix C. Jurisdiction of this Court is invoked under 28 U. S. C. Section 1331 and 28 U. S. C. Section 1343 and under the Fourteenth Amendment of the United States Constitution.

QUESTIONS PRESENTED.

The questions presented in this appeal may be stated as follows:

1. Did the District Court and the Court of Appeals err in their construction of the Constitution and laws of the State of Ohio and the Charter of the City of Cleveland?

2. Does the nominating process authorized by Sections 10 and 13 of the Charter of the City of Cleveland constitute discrimination and thereby deny plaintiffs the equal protection of the law guaranteed under the Fourteenth Amendment to the United States Constitution?

CONSTITUTIONAL AND CHARTER PROVISIONS INVOLVED.

Principally involved is the Fourteenth Amendment to the United States Constitution as adopted July 28, 1868, as follows:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Cleveland City Charter provisions involved are Sections 10 and 13, as follows:

> "§ 10 Selection of Candidates.
>
> The number of candidates for member of Council in each ward shall be the two candidates on the primary election ballot receiving the highest number of votes at the primary election. Provided that if any candidate at a primary election shall have received a majority of all of the votes cast for such office at the primary election he shall be the candidate for such office at the regular municipal election. In case there shall not be for any office more than two persons who shall have filed petitions as provided for in this Charter, the said persons shall be the candidates at the regular municipal election and the primary for that particular office shall not be held.
>
> The name of each person who is nominated in compliance herewith shall be printed on the official ballot at the general election, and the names of no other candidates shall be printed thereon."

"§ 13 Blank Spaces on Ballots.

One blank space shall be left at the end of the list of candidates for each office in which the elector may insert by writing, stamping or pasting the name of any eligible person, not printed on the ballot, for whom he desires to vote for such office, and votes cast for such person shall be counted and entered on the tally sheet."

STATEMENT OF THE CASE.

The plaintiffs, who are registered voters in the City of Cleveland, Ohio, filed a complaint seeking a declaration that Section 10 of the Charter of said city was unconstitutional under both the United States and the Ohio Constitution and that said charter section is in conflict with the general election laws of the State of Ohio. The complaint challenged the method authorized by the Charter of said city for the nomination and election of members of its city council. The named defendants are the City of Cleveland, its thirty-three councilmen and the four members of the Board of Elections of Cuyahoga County, Ohio.

Section 10 of the Charter of the City of Cleveland provides for the selection of non-partisan candidates for members of council from each ward of the city. The section in summary provides that, if there are only two candidates for council in any ward, no primary election need be held; and the two qualified persons who filed proper petitions shall be the designated opponents at the regular November municipal election. If, however, more that two persons file proper petitions for council in any ward, then a primary election must be conducted. If any candidate at such primary election shall receive a majority of all the votes cast for the office of councilman, he shall

be the only candidate whose name will appear on the council ballot at the general election. If no council candidate receives a majority of the votes cast in the respective wards at the primary election, the two candidates receiving the highest number of votes shall be the designated opponents for council in the general election.

The councilmanic ballots at primary and general elections are devoid of any party designation, whereas the Cleveland mayoralty ballots must contain the party designation beneath the name of the candidates.

REASONS FOR GRANTING THE WRIT.

Certiorari should be granted in this case because the decisions below are contrary to applicable decisions of this court. In ruling thereon the Sixth Circuit Court of Appeals ignored this court's recent holding in the case of *Della Hadley et al. appellants v. The Junior College District of Metropolitan Kansas City, Missouri, et al.* The decision in this case, rendered February 25, 1970 bears number 37, October Term, 1969.

The *Hadley* case involved the Fourteenth Amendment to the United States Constitution, and the "one man, one vote" principle as applied to the election of local government officials. The majority opinion in the *Hadley* case reads, in part, as follows:

> "States are required to insure that each person's vote counts as much, insofar as it is practicable, as any other person's. * * * that the right to vote in an election is protected by the United States Constitution against dilution or debasement."

The "one man, one vote" principle as enunciated by the United States Supreme Court in the *Hadley* case clearly affirms the complainant's contention that Section

10 of the Charter of the City of Cleveland dilutes and debases the votings rights of Clevelanders.

Prior to 1953, the names of the two council candidates receiving the highest number of votes in the primary appeared on the council ballot in the general election.

Cleveland's charter was amended in 1953 to provide that in council races where three or more candidates filed and one received a majority in a primary, his name alone would appear on the ballot in the general election. The only possible opposition would have to come from a write-in effort.

A study of the last four municipal elections shows that 67 councilmen received a majority of the vote required to elect them in the primary. There were 12 primary winners in 1963; 17 in 1965; 18 in 1967; and 20 in 1969. Considering that there are 33 council posts, more than half have been elected at the traditionally light vote primary elections. No write-in candidate has ever dislodged a primary selectee.

In the last eight years, only 53% of the registered voters came out to cast votes in primary elections; whereas 70.5% have voted in the general elections.

The difference in the percentage of eligible voters going to the booth on a primary day as against those voting in the general election demonstrates that the votes of many citizens are diluted and debased whenever a council candidate wins his ward seat in the primary, and appears all by himself on the November ballot.

There has been a steady decrease in voter interest in the last four primary elections because of this abridgement of voters' right to a choice.

The number of candidates winning final election at the primary has increased steadily. Last year there were 28 wards where the final decision was possible at a so-

called primary election. In 20 wards, 60% of the total number, this obnoxious 50%-plus-one-rule produced the council winner.

This increase has resulted because incumbents, knowing they have substantial support in the ward, encourage weak candidates to file, thereby insuring themselves of a 50%-plus-one-victory in the primary, thus diminishing and disfranchising the voters' right to the possibility of a choice in the general election.

The theory advanced at the time the Charter Amendment was proposed is that the primary leader will win in the general election anyway. However, the statistics show that in 38 wards in the last four elections, the 2nd placer in the primary won 74.5% of the time in the general elections.

The very fact that there is no choice for the voter in the general election is proof that his vote is being diluted and debased.

In the case of *Wesberry vs. Sanders*, 376 U.S. 1 (1964), the court held that the Fourteenth Amendment guaranteed all voters the right to have their votes given the same weight as that of the other voters. An absence of choice is an absence of such weight in his vote.

The few councilmanic races where there is a contest, votes cast therein are given that "same weight," whereas, in the many wards where there is no contest, obviously there is a dilution or denial of the Fourteenth Amendment guarantees.

As it is now, one vote over the 50% precludes the chance of any meaningful councilmanic contest in any general election in Cleveland.

The holding in the *Hadley* case would seem to indicate clearly that Sections 10 and 13 of the Cleveland Charter violate the Fourteenth Amendment of the United States

Constitution as applied to the "one man, one vote" principle.".

In order for each Cleveland voter to be given the equal protection enunciated in the *Wesberry* case, the City must return to contested races in every councilmanic ward thus guaranteeing a choice, not an echo.

CONCLUSION.

For the foregoing reasons, a writ of certiorari should be granted.

Respectfully submitted,

FRANKLIN A. POLK,
5725 Broadway,
Cleveland, Ohio 44127,
Counsel for Petitioner.

APPENDIX A.

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION.

MEMORANDUM.

(Filed June 24, 1969.)

THOMAS, *J.*

Robert Bennett and Evelyn Schrenk, residents and registered voters of the City of Cleveland, seek a declaration and decree that section 10 of the charter of the City of Cleveland is unconstitutional under the federal and state constitutions and illegal under Ohio law. The defendants are the City of Cleveland, its councilmen, and members of the Cuyahoga County Board of Elections. The defendant City of Cleveland and its councilmen move for dismissal of the action.

Plaintiffs rest jurisdiction upon 28 U.S.C. § 1331 and 28 U.S.C. § 1343 and upon the claim that "this action arises under the Fourteenth Amendment of the United States Constitution." Though conclusionary this allegation and similar allegations that cite violations of the equal protection clause of the 14th amendment are deemed sufficient to vest this court with jurisdiction of the subject matter. See *Baker v. Carr*, 369 U.S. 186, 199 (1961). It is not the lack of federal jurisdiction upon which the defendants rest their motion to dismiss. Rather, defendants base their motion on the ground that complaint fails to state a claim on which relief can be granted.

The complaint quotes the first paragraph of section 10 of the Cleveland charter. Entitled "Selection of Candidates," section 10 consists of two paragraphs. It states:

§ 10. Selection of Candidates

The number of candidates for member of Council in each ward shall be the two candidates on the primary election ballot receiving the highest number of votes at the primary election. Provided that if any candidate at a primary election shall have received a majority of all of the votes cast for such office at the primary election he shall be the candidate for such office at the regular municipal election. In case there shall not be for any office more than two persons who shall have filed petitions as provided for in this Charter, the said persons shall be the candidates at the regular municipal election and the primary for that particular office shall not be held.

The name of each person who is nominated in compliance herewith shall be printed on the official ballot at the general election, and the names of no other candidates shall be printed thereon.

The complaint relies on several sections of Ohio law that deal with primary and general elections. However, a cause of action based on Ohio law would only be justiciable as pendent jurisdiction, i.e. dependent upon a separate federal cause of action in the complaint. Hence, it becomes essential to determine whether the complaint states a cause of action under federal law. The jurisdictional first paragraph of the complaint cites 28 U.S.C. § 1343. In part this section vests the United States district courts with original jurisdiction in civil actions,

> (3) To redress the deprivation, under color of any state law, statute, ordinance, regulation * * * of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens * * *.
>
> (4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

Notwithstanding the citation of Section 1343, nowhere does the complaint invoke any federal civil rights or voting legislation. Moreover, no other act of Congress is cited as the source of the stated cause of action. The sole federal predicate for the action mentioned in the complaint is the equal protection clause of the 14th amendment of the Federal Constitution. It is the sufficiency of this claimed cause of action that is challenged by the motion to dismiss.

Paragraph 10 sets the stage for the complaint's first resort to the 14th amendment. It states that

> by virtue of the provision of Section 10 * * * the primary election held in the City of Cleveland with respect to councilmen and candidates contains, as a part of its provisions, and as one of its purposes, a method of electing candidates for office, as opposed to the limited purpose of nominating candidates for the general election.

Paragraph 11 then states that

> the effect of such a provision * * * provides a method for dis-enfranchising registered voters of the City of Cleveland, from the constitutionally guaranteed rights under the Fourteenth Amendment * * * to vote for the representative to the City Council of the City of Cleveland, in the event a candidate of a primary election receives more than 50% of the total vote cast.

Contrary to these contentions of the plaintiffs, section 10 provides only the selection of councilmanic candidates, not their election. The first paragraph explains the selection of candidates at the primary election with respect to the persons who have filed nominating petitions as candidates for council (non-partisan petitions as provided for in the charter). Should there be more than two candidates at the primary the two receiving the highest vote will be the candidates, provided that a candidate (of the three or

more) that receives "a majority of all votes cast" at the primary election "shall be the candidate for such office at the regular municipal election." Should there be no more than two candidates at the primary election, "the said persons [one or two] shall be the candidates at the regular municipal election."

The second paragraph of section 10 makes it plain that its first paragraph relates to the nomination of candidates, not their election. It states:

> The name of each person who is nominated in compliance herewith shall be printed on the official ballot at the general election, and the names of no other candidates shall be printed thereon.

Plaintiffs contention that section 10 has "as one of its purposes, a method of electing candidates for office, as opposed to the limited purpose of nominating candidates for the general election," ignores the provision for write-in candidates at the regular municipal election expressly made by section 13 of the charter. In a blank space that must be provided "at the end of the list of candidates for each office" the elector

> may insert by writing, stamping or pasting the name of any eligible person, not printed on the ballot, for whom he desires to vote for such office, and votes cast for such person shall be counted and entered on the tally sheet.

It is this provision for write-in candidates in the Cleveland charter that was foremost in the reasoning of the Supreme Court of Ohio in *State, ex rel. Gamble v. Duffy*, 164 O.S. 231 (1955) when it upheld the constitutionality (tested by Ohio's constitution) of predecessor section 10 of the Cleveland City Charter. The court held:

> The provision of section 10 of the charter, that if a candidate at a primary election shall receive the ma-

jority of votes cast he shall be the candidate for office at the regular municipal election, does not have the effect of providing for the election of such candidates to the office, as contended by relator, but merely determines the number of candidates for office at the general election and does not prevent electors from writing in the name of any person qualified for the office.

The court's opinion earlier concluded:

> Under the home-rule provision of the Constitution (Section 7, Article XVIII) a municipality which has adopted a charter form of government has the power to prescribe the manner of nominating its purely local officers.

The court also concluded:

> The provisions of section 10 of the charter deal only with nominations. Section 1 of Article XVII of the Constitution [Elections] does not deal with the subject of nominations.

It is pertinent to digress to review the history of section 10 and related sections of the charter. In 1953 Cleveland voters amended section 10 to read exactly as it now reads with one exception. The section as amended applied to "the number of candidates for any office."

In 1958 an exercise of the initiative power of the charter required council to submit amendments to the Cleveland charter. Cleveland voters then amended the charter in several respects. Special provision was made for the nomination of candidates for the office of mayor "in the manner provided by general law." Section 10 of the charter was modified to limit its provision (as adopted in 1953) to councilmanic candidates. Another amendment provided

> No statement of party affiliation shall be required of any elector requesting a ballot for the nomination of member of council.

Amendments to the charter approved by voters in 1960 made provision for partisan primaries for the nomination of mayoralty candidates, as well as the filing of an independent nominating petition for mayoralty candidates. Another amendment provided that

> candidates for the office of members of council shall be nominated by separate ballot in the primary election held for the office of mayor and in the manner prescribed by this charter. No statement of party affiliation shall be required of any elector requesting a ballot for the nomination of member of council.

Independently construing section 10, this court determines that section 10, in the words of *Duffy, supra*, "does not have the effect of providing for the election of such candidate to the office." However, since this court sits as a trial court in Ohio it is bound, in any event, to accept and apply *Duffy's* construction of Ohio law, (the Cleveland city charter, Article XVII and Article XVIII of the Ohio Constitution).

Hence, to the extent plaintiffs' attempt to plead a cause of action based on the 14th amendment is sought to be undergirded by the statement that the proviso of section 10 is "a method of electing candidates for office," the complaint must fail.

Another paragraph of the complaint that seeks to state a federal cause of action is paragraph 19. The first part of paragraph 19 of the complaint speaks of "the reduction of the effectiveness of the plaintiffs' votes and the votes of those similarly situated by the ordinance hereinbefore described . . . ." It is this alleged contention that is said to constitute "invidious discrimination" and to deny

"the equal protection to the law as granted by the Fourteenth Amendment to the Constitution of the United States." These allegations will be construed in conjunction with earlier paragraphs of the complaint that incorporates extensive statistics of Cleveland municipal elections.

Use of the word "elected" or "electing" in certain column headings above these sets of statistics are impermissible, in view of *State, ex rel. Gamble v. Duffy, supra*, e.g., "50 + 1 primary vote for elected candidate" and "approximate per cent of voters *electing* candidate."

Disregarding the improperly descriptive words "elected" and "electing" the sets of statistics reveal these facts among others. The percentage of the registered voters of Cleveland in a primary election that selected a candidate by 50 + 1 vote compared with the number of registered voters range from 18% to 55%. The votes in a primary election that selected a councilman by 50% + 1 vote (the councilman being elected at the regular municipal election), compared with the vote at the regular election (presumably with the vote for mayor, since the councilman was unopposed at the regular election) range from a minimum of 24.6% to 67.5%.

The statistics also reflect how the interest in the mayoralty election affects the turnout of registered voters both at the primary and at the regular municipal elections. In 1967 (the year of the election of Carl B. Stokes as mayor), 55.3% of all registered voters voted at the primary election and 69.6% voted in the regular municipal election. Comparatively in elections from 1951 through 1965 the percent of voters in primary elections compared to registered voters ranged from 22.5% in 1959 to 43.9% in 1955; and the percent of voters in the regular municipal elections as compared with registered voters ranged from 35.2% in 1959 to 64% in 1955.

The lower percentage of registered voters who have voted in Cleveland's primary elections compared with the percentage of registered voters who voted in the regular municipal elections, corresponds to the percentage differential that ordinarily characterizes primary and general election vote totals in municipal, state, and federal elections. Hence this differential gleaned from the cited statistics, in and of itself, is not sufficient to show any denial of the basic principle of "one person-one vote" that has evolved as the franchise equivalent of the equal protection clause of the 14th amendment in *Reynolds v. Sims*, 377 U.S. 533 (1964), and following decisions.

However, paragraph 19, as seen in the earlier quotation, claims that the "ordinance" (section 10 of the charter) reduces "the effectiveness of the plaintiffs' votes and the votes of those similarly situated"; and it is claimed that this constitutes "invidious discrimination," found by the Supreme Court in *McLaughlin v. Florida*, 379 U.S. 184 (1964) to be a condition denying "the equal protection of the laws guaranteed by the Fourteenth Amendment."

Under section 10 it will be seen that should there only be two candidates for council in a particular ward (ward A) these two candidates automatically face each other in the regular municipal election for Ward A councilman and "the primary for that particular office shall not be held."

Constitutionally speaking it cannot be concluded that section 10 gives the voters of ward A any legal advantage over the voters of ward B in which of the three or more candidates one candidate receives 50% + 1 vote, thereby becoming the only candidate whose name later is printed on the ballot at the regular municipal election for councilman in ward B. As seen, he is not thereby elected since he may still face a write-in candidate at the regular municipal election.

The voters of ward B suffer no "invidious discrimination" by reason of section 10's proviso. It is within the exercise of the power of franchise of the registered voters of ward B to so cast their votes that no candidate of the three or more candidates running for council would receive "a majority of all of the votes cast for such office at the primary election." Should the voters of ward B so cast their vote, section 10 would insure as candidates, at the regular municipal election, those "two candidates * * * receiving the highest number of votes at the primary election."

Any failure of registered voters to exercise their legally unrestricted right of "one person-one vote" is not equivalent to "invidious discrimination" in violation of the equal protection of laws guaranteed by the 14th amendment. Moreover, the charter makes councilmanic elections non-partisan. Thus the Cleveland charter does not diminish but enlarges the freedom of franchise of registered voters in each Cleveland ward to vote for councilmen.

For the reasons stated, it is concluded that plaintiffs' complaint does not state a justiciable federal cause of action based on their claim that section 10 denies the equal protection of the laws clause of the 14th amendment. Nevertheless paragraph 13 requires consideration and comment. It asserts:

> the primary election, as held in the City of Cleveland, is held out to be, and understood to be, by the voters of the City of Cleveland, as an election for the purpose of nominating and not electing, the ultimate representative to the council for the City of Cleveland.

As previously seen, section 10 is written and has been interpreted by the Supreme Court of Ohio to provide for

the nomination and not for the election of councilmanic candidates. Hence, section 10 contains no legal misrepresentation that might sustain the plaintiffs' next claim that,

> by reason of the foregoing, great numbers of registered voters of the City of Cleveland are misled . . .

Nevertheless, the statistics amassed by the plaintiffs support plaintiffs' claim that great numbers of registered voters of the City of Cleveland

> do not exercise their right to vote in a primary election, and, as has occurred in the past, they have thereby lost their right to vote for the representative of their ward to the Council of the City of Cleveland . . .

The statistics further show that since 1959 section 10 has permitted 67 councilmen, nominated by 50 . . . 1 vote of the primary vote, to be elected unopposed at the regular municipal election.

Hence there continues to be a factual foundation for a feeling in the community which this court recognized on October 20, 1965, in an oral opinion in *State, ex rel. Socha v. Cuyahoga County Bd. of Elections*, Case No. 819,924 (C.P. Cuy. Cty.):

> I think what we really have here is a complaint aimed at Section 10 of the City Charter. There is a feeling there that somehow this defeats the right of popular will by permitting a person to be chosen councilman at a primary election, and there is some basis, I think, for feeling that way, particularly when you bear in mind that if there are only two people on that ballot, then, automatically, these two people go into the general election. . . . That is the way the charter reads, and I can only point out to those here that this

very section has been considered by the Supreme Court of Ohio and upheld as valid.

If it is their desire to remedy section 10's proviso then plaintiffs should seek a different petition. The challenged proviso was added to section 10 of the charter by a vote of the Cleveland voters in 1953, using their home-rule power to amend the Cleveland charter. In 1958 another vote of Cleveland's voters approved an amendment to section 10, initiated by a petition filed with Council, that makes section 10 apply only to the selection of councilmanic candidates. Exercising the same power of initiative that produced the 1958 amendment of section 10, plaintiffs and other registered voters of Cleveland can initiate a petition to amend section 10. Should enough voters feel that section 10's proviso defeats the right of popular will the challenged proviso can be repealed or modified.

The motion of the defendant City and its councilmen to dismiss the complaint for failure to state a federal cause of action is granted.

WILLIAM K. THOMAS,
United States District Judge.

APPENDIX B.

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(Filed February 20, 1970.)

BEFORE: WEICK, EDWARDS, and MCCREE, *Circuit Judges.*

This is an appeal from an order dismissing for failure to state a federal cause of action, a complaint seeking a declaration that Section 10 of the Charter of the City of Cleveland is unconstitutional under the Fourteenth Amendment of the United States Constitution. Section 10 provides:

> § 10 Selection of Candidates.
>
> The number of candidates for member of Council in each ward shall be the two candidates on the primary election ballot receiving the highest number of votes at the primary election. Provided that if any candidate at a primary election shall have received a majority of all of the votes cast for such office at the primary election he shall be the candidate for such office at the regular municipal election. In case there shall not be for any office more than two persons who shall have filed petitions as provided in this Charter, the said persons shall be the candidates at the regular municipal election and the primary for that particular office shall not be held.
>
> The name of each person who is nominated in compliance herewith shall be printed on the official ballot at the general election, and the names of no other candidates shall be printed thereon.

Upon consideration, it is ORDERED that the judgment be and it hereby is affirmed because the complaint does not present a substantial federal question.

Entered by order of the court.

/s/ CARL W. REUSS,
Clerk.

APPENDIX C.

ORDER OF THE UNITED STATES COURT OF APPEALS DENYING REHEARING.

(Filed April 2, 1970.)

BEFORE: WEICK, EDWARDS, and MCCREE, *Circuit Judges.*

Upon consideration, the petition for rehearing is denied.

Entered by order of the court.

/s/ CARL W. REUSS,
Clerk.